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No. 02-1308

In The Supreme Court of the United States

ERIC KUNG-SHOU HO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

Pursuant to United States Supreme Court Rule 15.6, petitioner replies to new points made in the Government's Brief in Opposition recently submitted in the instant case, 02-1308. The intent of this reply is to point out where the petitioner feels mistakes in law and fact were made in the Government's Brief in Opposition.

Petitioner Clearly Contested the Court of Appeals' Determination About the Building Satisfying the 1990 Definition of "Facility"

The issue lies on pages 10 through 11 of the Government's Brief in Opposition arguing that "petitioner does not contest the court of appeals' determination that 'the hospital satisfies the pre-1990 definition of 'facility' because [petitioner] purchased it and removed the asbestos for commercial purposes, and the definition did not exclude previously abandoned buildings.'" Having made this bold assertion, the government then argues that "Petitioner therefore would not be entitled to reversal of his criminal convictions even if his procedural challenge to the 1990 regulatory amendment could properly be raised within this prosecution, and even if that challenge were ultimately found to have merit." Government's Brief in Opposition at 10.

The government's assertion lacks merit. On page seven of his Petition for a Writ of Certiorari, petitioner clearly contested the court of appeals' selective characterization of the factual record (which rejected the fact findings by the District Judge) to buttress its result-oriented

opinion (which accepted the government's belated Commerce Clause argument not raised below[1]), stating that, "[i]n another footnote, the court of appeals said that petitioner had an underlying commercial purpose in buying and cleaning up the building, *despite contrary evidence in the record* (which was not noted)." (Emphasis supplied). Although petitioner thereby demonstrated his understanding that the court of appeals had made such a factual determination, this statement simply cannot fairly be read to suggest the type of acquiescence or waiver that the government suggests in its Brief in Opposition.

Petitioner further supported his argument in this *as applied* challenge to the EPA's improper promulgation and use of the regulation at issue by next pointing out that the court of appeals failed to properly evaluate the *present use*

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[1] The government's waiver argument is ironic because in the proceeding below, petitioner had strenuously complained to the court of appeals about allowing the government to raise novel arguments that it hadn't raised on the key issues below (*i.e.*, contending for the first time in this case that the Commerce Clause nexus to the conduct being prosecuted could be supported by evidence that non-resident workers were used, and the supposed impact that this could have on "legitimate" asbestos companies). Persuasive authority was provided that because this belated argument on the core issue was untimely, it shouldn't be considered on appeal, including *Hormel v. Helvering*, 312 U.S. 552, 556, 61 S.Ct. 719, 721 (1935) ("Except in cases of 'extraordinary circumstances,' we do not consider issues raised for the first time on appeal.") and *Vogel v. Veneman*, 276 F.3d 729, 733 (5th Cir. 2002) ("[T]he Vogels are precluded from raising this argument because they failed to make it before the district court. Except in cases of "extraordinary circumstances," we do not consider issues raised for the first time on appeal. . . . A party must have raised an argument "to such a degree that the trial court may rule on it." *In re Fairchild Aircraft Corp.*, 6 F.3d 1119, 1128 (5th Cir. 1993).").

of the building in question, an approach recently suggested by this Court in a unanimous decision construing the federal arson statute:

> As concerns the use of the building at issue, the court of appeals failed to properly evaluate and apply *Jones v. United States*, 529 U.S. 848, 120 S.Ct. 1904 (2000), which holds that a building's *present* use must first be evaluated before next determining whether that use substantially affects interstate commerce. Moreover, the court of appeals didn't properly evaluate and apply other recent Commerce Clause precedent that warns against aggregating remote or negligible effects on commerce to reach the requisite nexus when doing so would push the reach of the Commerce Clause beyond its logical limits – and particularly as to statutes for which Congress hadn't expressed an intent to change the balance between state and federal powers.

Petition for Writ of Certiorari, at 7-8.

Moreover as petitioner pointed out to the court of appeals, even before this Court's decision in *Jones*, a panel of the Fifth Circuit had properly held in *United States v. Corona,* 108 F.3d 565, 567 (5th Cir. 1997), which also involved a federal arson prosecution, that simply *planning to rent a building* wasn't enough to provide a sufficient nexus under the Commerce Clause. In that decision (unlike the case at hand), the Fifth Circuit panel properly realized the constitutional problems that accepting such an attenuated nexus would create, observing that "[t]he commercial dimensions of Corona's project were modest at best, and the interstate commerce component of his commercial plans was trifling[,]" and warning that taking the "effects test" to its logical extreme would result in the

problem that *United States v. Lopez*, 514 U.S. 549, 115 S.Ct. 1624 (1995) cautioned against. *Corona*, 108 F.3d at 570.

CONCLUSION

Because the ruling of the court of appeals below in allowing the aggregation of *de minimus* or potential episodes of local pollution with unconnected conduct to supply the requisite Commerce Clause nexus needed to withstand an *as applied* constitutional challenge remains inconsistent with this Court's recent Commerce Clause pronouncements, and basic principles of federalism, the petitioner respectfully prays that his petition for writ of certiorari be granted.

Respectfully submitted,

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